U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue date: 11Sep2001

Case No.: 2001-INA-5

In the Matter of:

KORAL INTERNATIONAL TRADING,
Employer,

on behalf of

KORAL KARSAN,
Alien

Appearance:

Before: Vittone, Burke and Chapman
Administrative Law Judges

DECISION AND ORDER AFFIRMING DENIAL OF CERTIFICATION

This case arose from an application for labor certification on behalf of Alien Koral Karsan ("Alien") filed by Koral International Trading ("Employer") pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the "Act"), and the regulations promulgated thereunder, 20 C.F.R. Part 656. The Certifying Officer ("CO") of the United States Department of Labor denied the application, and the Employer requested review pursuant to 20 C.F.R. § 656.26.

The following decision is based on the record upon which the Certifying Officer (CO) denied certification and Employer's request for review, as contained in the Appeal File ("AF"), and any written argument of the parties.

STATEMENT OF THE CASE

On January 30, 1997, Koral International Trading Inc. filed an application for alien employment certification on behalf of the Alien, Koral Karsan, to fill the position of Wholesale Importer/Exporter. Duties of the job to be performed were described as follows:

> Will export domestic merchandise to foreign merchants and consumers and import foreign merchandise for sale to domestic merchants or consumers: will arrange for purchase and

transportation of imports through company representative abroad and sell imports to local customers. Will sell domestic goods, materials or products to representatives of foreign companies. Must speak Turkish.

Minimum requirements for the position were listed as a High School education and two years experience in the job offered, and ability to speak Turkish. (AF 2).

Employer received two applicant referrals in response to its recruitment efforts, one of whom was rejected based upon the fact that he was unwilling to accept the position at the salary advertised, the second because he was found not qualified for the position. (AF 46-47).

A Notice of Findings (NOF) was issued by the Certifying Officer (CO) on June 9, 2000, proposing to deny labor certification on several bases. Noting that the employer corporation and the Alien bear the same first name, that the Alien resides at the same location as the business, and that the President and the Alien, who is the Vice-President, are the only two employees of the business, the CO questioned whether there was a valid employer-employee relationship, and thus, whether a bona fide job opportunity in fact exists. Employer was instructed to submit **evidence** (*emphasis original)*:

which must include, but is not limited to, list of corporate officers and identify their status in the U.S. (Non-immigrant alien, permanent resident alien or U.S. citizen), submit evidence documenting the corporation's independence from its stockholders and furnish financial history of the corporations including the amount of investment of each shareholder and the percentage such investment constitutes of the total investment in the corporation.

In addition, the CO challenged the rejection of the two U.S. workers as for other than lawful job-related reasons, and requested that Employer explain the role of Dogan Ak, the person identified to prospective applicants as the person of contact. The CO observed that while Mr. Ak was not identified as the agent in the instant case, their records show that Mr. Ak was involved as an agent of employers and aliens in a number of other applications for Alien Labor Certification. Pursuant to 20 C.F.R. 656.20(b)(3)(i), it is contrary to the best interests of U.S. workers to have the alien and/or agent and/or attorney for the alien participate in interviewing or considering U.S. workers for the job offered the alien, and such an agent and/or attorney may not be involved in the process, unless the agent and/or attorney is employer's representative who normally does so. Employer was also advised to submit a copy of its Posting Notice. (AF 52-55).

In Rebuttal, Employer stated that the Alien is a full-time employee and Vice President of the company, and that the position is clearly open to the public as evidenced by Employer's placement of an advertisement. Employer stated that the company name was chosen because it was a familiar Turkish word. Employer indicated that business is conducted on the first floor, and the Alien resides on the second floor with a separate entrance, which is not uncommon in New York. Employer stated that he is the sole shareholder and that the Alien has not invested anything in the company. Employer stated

that the Alien was hired because of his more than twenty years experience in Turkey, Europe and the United States. With respect to the rejection of the two U.S. applicants, Employer reiterated that one of the rejected workers had excessive salary demands that Employer could not meet; and that the other was rejected because he did not have wholesaler experience. Employer indicated that Dogan Ak was appointed by Employer to conduct the interviews under Employer's supervision, that Employer was present at the interviews and that Employer, not Dogan Ak, rejected the applicants. Finally, Employer submitted a copy of its new job posting. (AF 56-60).

A Final Determination denying labor certification was issued by the CO on July 21, 2000, based upon a finding that Employer had failed to adequately document that a true bona fide job opening exists, had failed to adequately document lawful job-related reasons for rejection of one of the U.S. workers, and had failed to adequately document that Mr. Ak normally participates, in any manner, in interviewing or considering applicants for jobs not involving alien labor certification. (AF 61-63).

Employer filed a Request for Review on July 11, 2000, and the matter was docketed in this office on November 7, 2000. Employer submitted a letter in support of its appeal dated November 24, 2000.

DISCUSSION

Pursuant to 20 C.F.R. 656.3, "Employment" means permanent full-time work by an employee for an employer other than oneself. Section 656.20(c)(8) requires that the job opportunity be clearly open to any qualified U.S. worker. Requiring that the job opening be bona fide ensures that a true opening exists, and that the position is not merely the functional equivalent of self-employment.

The NOF questioned the Alien's relationship to this business entity and requested Employer to furnish evidence which established that a true employer-employee relationship existed. The burden of proof in the labor certification process is on the Employer. *Giaquinto Family Restaurant*, 96-INA-64 (May 15, 1997); *Marsh Edelman*, 94-INA-537 (Mar. 1, 1996); 20 C.F.R. 656.2(b). As was noted by the Board of Alien Labor Certification Appeals in *Carlos Uy III*, 1997-INA-304 (Mar 3, 1999)(*en banc)*, "[u]nder the regulatory scheme of 20 C.F.R. Part 24, rebuttal following the NOF is the employer's last chance to make its case. Thus, it is the employer's burden at that point to perfect a record that is sufficient to establish that a certification should be issued." *Id.* at 8.

In rebuttal, Employer chose to submit little in the way of documentation to support its position that there is a true employer/employee relationship, and thus, that there is a bona fide job opportunity. Employer was requested to submit evidence at a minimum documenting the identification of its corporate officers, the corporation's independence from its stockholders and the corporation's financial history. Employer presented no such documentation. The record includes the Certificate of Incorporation and a copy of a lease agreement (AF 10-16), and nothing more. Thus, we concur in the CO's finding that the Employer has failed to carry its burden in establishing that a true bona fide job

opening exists for a qualified U.S. worker.

In addition, pursuant to 20 C.F.R. 656.20(b)(3)(i) and (ii), the alien's agent or attorney may not interview or consider U.S. workers for the job offered to the alien, unless the agent or attorney is the employer's representative who normally interviews or considers, on behalf of the employer, applicants for job opportunities such as that offered the alien, but which do not involve labor certifications. Employer's rebuttal identified Mr. Ak as a "consultant" for one of Employer's staff who had applied for permanent residency. Additionally, Employer indicated that it "appointed" Mr. Ak to conduct the interviews under Employer's supervision. However, Employer did not establish that Mr. Ak normally participates, in any manner, in interviewing or considering applicants for jobs not involving alien labor certification, nor did it adequately explain why applicants were interviewed in Mr. Ak's office in Manhattan, rather than at the job site in Amityville, New York. Thus, we conclude that Employer's labor certification was appropriately denied on this basis as well.

Finally, the Employer did not provide legitimate reasons for the rejection of one of the applicants, Erdal Celik, whose application indicates that he worked for at least two years with a Turkish import-export company, performing duties consistent with those required by the position in question. He also had more than two years of experience working as a consultant with Turkish companies exporting goods to the United States. He is fluent in the Turkish language. In light of this, the Employer's statement in rebuttal that Mr. Celik was not hired because he did not have wholesaler experience is insufficient to justify rejection of this U.S. worker.[1]

. **ORDER**

The Certifying Officer's denial of labor certification is hereby **AFFIRMED** and labor certification is **DENIED.**

SO ORDERED.

For the panel:

A
LINDA S. CHAPMAN
Administrative Law Judge

1 In a letter dated November 24, 2000, and addressed to the Board of Alien Labor Certification Appeals, the Employer elaborated on its reasoning for rejecting the two applicants, the Employer's corporate structure, and the involvement of Mr. Ak. However, as that information was submitted after the CO's Final Determination, it will not be considered by the Board.

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.